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No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Whether, under *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), a vacated, unconstitutional conviction can strip an acquittal of its preclusive effect under the collateral estoppel prong of the Double Jeopardy Clause.

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INTRODUCTION

Respect for a jury's acquittal is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). When a jury renders a verdict of not guilty, the Double Jeopardy Clause treats that verdict as a sacrosanct, final judgment, immune from any subsequent impeachment. Half a century ago, the Court held that this immunity does not simply bar a second prosecution on the exact charge of which a defendant was acquitted. In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court construed the Double Jeopardy Clause to incorporate a rule of collateral estoppel, barring a second prosecution on any charge that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. This case is about the reach of *Ashe*'s collateral estoppel rule.

In 2011, a jury acquitted petitioners Juan Bravo-Fernandez and Hector Martínez-Maldonado of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits bribery involving a federal program. The acquittals, it is undisputed, logically depended on a jury finding that petitioners did not violate § 666; petitioners did not contest any other element of the charges. Thus, under a straightforward application of *Ashe*, the acquittals preclude any second prosecution for violating § 666.

The government nonetheless seeks to persuade a second jury, at a second trial, that petitioners violated § 666. And the First Circuit held that it could. Here is why: In addition to acquitting petitioners of conspiring and traveling to violate § 666, the jury at the 2011 trial convicted them of standalone § 666 charges. In 2013, those convictions were vacated as

unconstitutional, because the district court's instructions had invited the jury to convict based on conduct that does not actually violate § 666. But in the First Circuit's view, the vacated, unlawful convictions were still a relevant part of the *Ashe* analysis, *i.e.*, part of what the jury necessarily determined at trial. The court held that the vacated convictions were inconsistent with the acquittals and thus stripped the acquittals of any preclusive effect under *Ashe*.

If this all sounds familiar, it should. In *Yeager v. United States*, 557 U.S. 110 (2009), this Court held that an inconsistent hung count does not strip a simultaneously rendered acquittal of its preclusive effect. Because hung counts are legal nullities, *Yeager* held, they are totally irrelevant in the *Ashe* analysis. This case is *Yeager* all over again—just substitute "vacated convictions" for "hung counts." Vacated convictions are legal nullities every bit as much as hung counts. Collateral estoppel applies only to valid and final judgments, and vacated convictions, like hung counts, are neither. If the government cannot use hung counts to strip acquittals of preclusive effect, it cannot use vacated convictions either. All that matters is the acquittals, and the Double Jeopardy Clause does not allow the government to look beyond their four corners. The government does not get to try to prove at a second trial what the jury rejected at the first.

Not only is *Yeager* controlling, but the government's position in this case is antithetical to a fair system of criminal justice. The government should never benefit from having obtained an unlawful conviction. This Court held 70 years ago that a defendant whose conviction has been vacated "must stand in the position of any man who has been accused of a crime

but not yet shown to have committed it"—no collateral consequences can flow from the vacated conviction. *Fiswick v. United States*, 329 U.S. 211, 223 (1946). A vacated, unconstitutional conviction certainly cannot deprive defendants of *other* constitutional rights.

The decision below would also encourage the very prosecutorial abuses that *Ashe* and *Yeager* sought to stamp out. Overlapping, duplicative charges have become an epidemic. They pressure defendants to take pleas and dramatically increase the odds of at least one conviction when cases go to trial. Collateral estoppel exists to prevent this sort of abuse. But under the decision below, prosecutors could bring duplicative charges without fear of consequence, secure in the knowledge that a split jury decision would eliminate the preclusive effect of any acquittal and pave the way for a retrial—a retrial that double jeopardy would forbid had the government started with a compact indictment. And where the government has a weak case, the decision below creates perverse incentives to pursue a conviction on an unlawfully broad theory rather than risk a hung count under proper instructions, because a vacated conviction would allow the government to try again.

This prosecution well illustrates the point. The government piled duplicative charge on top of duplicative charge, and, to boot, advocated an erroneously expansive interpretation of § 666. The result was four acquittals and two unconstitutional convictions. Then the government successfully opposed release pending appeal, so petitioners spent a combined 18 months in a federal penitentiary. Worse, the government also charged petitioners with violating other statutes that had been repealed. Fortunately for petitioners, the district court corrected that mistake—but only after

petitioners stood trial, and were convicted, for offenses that the legislature had eliminated.

Once was enough. The Double Jeopardy Clause prevents the government from asking a second jury, at a second trial, to part ways with the jury that acquitted petitioners in 2011. The government overcharged this case, overreached with the jury instructions at the first trial, and forced petitioners to serve significant prison time despite the absence of a valid conviction. This is hardly the case for retreating from *Ashe* and *Yeager* and making the government better off because it secured an unconstitutional conviction instead of a hung jury.

OPINIONS BELOW

The First Circuit's opinion is reported at 790 F.3d 41 and reproduced at Pet. App. 1a-40a. The district court's opinion is reported at 988 F. Supp. 2d 191 and reproduced at Pet. App. 41a-53a.

JURISDICTION

The First Circuit issued its decision on June 15, 2015. Pet. App. 1a. Petitioners filed a timely petition for rehearing en banc, which the court denied on July 27, 2015. Pet. App. 134a-135a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

STATEMENT

1. On June 22, 2010, a federal grand jury indicted petitioners Bravo and Martínez on a series of multiple, overlapping bribery-related charges in connection with their trip to a Las Vegas boxing match in May 2005. Bravo is the president of a private security firm in Puerto Rico, and Martínez was then a member of the Puerto Rico senate. The government alleged that Bravo paid some of Martínez's and another Puerto Rico senator's expenses for the trip in connection with the senators' support of two uncontroversial bills related to the security industry in Puerto Rico. Pet. App. 3a, 61a-63a. Those expenses—totaling perhaps a few thousand dollars—included Martínez's plane ticket, both senators' tickets to the boxing match, a single dinner, Martínez's hotel room one of the two nights in Las Vegas, and both senators' rooms at a Marriott hotel in Florida when their flight home laid over. *Id.*

Notwithstanding the government's theory that Bravo intended the trip as a bribe, the second senator paid for his own hotel room both nights in Las Vegas, and for Martínez's room the second night. *Id.* at 62a. The jury heard evidence that Bravo had invited Martínez only as a last-minute replacement because one of Bravo's friends was hospitalized after a motorcycle accident and had to cancel. COA Joint App. 257-58. And Martínez had already supported the proposed legislation before he even heard about the trip. Pet. App. 90a; COA Joint App. 279. The Puerto Rico senate passed the bills by votes of 26-1 and 24-1. COA Joint App. 246, 250.

2. The government charged petitioners with a panoply of federal crimes based on this two-day trip: committing federal program bribery, in violation of 18

U.S.C. § 666; conspiring to violate § 666, in violation of 18 U.S.C. § 371; traveling in interstate commerce to further violations of § 666, in violation of 18 U.S.C. § 1952(a)(3)(A); traveling in interstate commerce to further violations of Puerto Rico bribery statutes, also in violation of § 1952(a)(3)(A); and conspiring to travel in interstate commerce in aid of racketeering (*i.e.*, the alleged bribery), also in violation of § 371. Pet. App. 3a-4a, 63a. The government also charged Martínez with obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). Pet. App. 63a.

At the government's urging and over petitioners' objection, the court instructed the jury that § 666 criminalizes not only *quid pro quo* "bribes" in which a person gives "something of value *in exchange* for an official act," but also mere "gratuities" in which a person gives "a reward ... *for a past act that [a public official] has already taken.*" *Id.* at 88a-89a. Two instructions "told the jury that Bravo could be convicted under § 666 for agreeing to give Martínez a gratuity, and that Martínez could be convicted under § 666 for agreeing to accept the same." *Id.* at 89a. A third instruction told the jury that "the government need not prove that Bravo offered or agreed to give Martínez anything of value before the transaction that was the subject of the 'payment' took place, and that it is sufficient for conviction to show that Bravo 'offered, or agreed to give the thing of value *after* the transaction.'" *Id.* (alterations omitted). The government's closing argument further invited the jury to convict on the theory that Bravo paid Martínez a gratuity in violation of § 666 by "emphasizing that 'it doesn't matter if the trip was offered after official acts were taken.'" *Id.* (alterations omitted).

On March 7, 2011, after a three-week trial, the jury acquitted Bravo and Martínez of conspiring to violate § 666. The jury likewise acquitted them of traveling in interstate commerce to further a violation of § 666. But the jury convicted both petitioners on the standalone § 666 charges. The jury also convicted Bravo of conspiring to travel in interstate commerce to further "unspecified 'racketeering' activity," and traveling in interstate commerce to further a violation of Puerto Rico bribery statutes. The jury acquitted Martínez of those interstate travel offenses. The jury also acquitted Martínez of obstruction. *Id.* at 4a, 64a.

The district court granted Bravo's motion for judgment of acquittal on the charge of traveling in interstate commerce to further a violation of Puerto Rico bribery statutes, because the Puerto Rico legislature had repealed those bribery statutes before petitioners traveled to Las Vegas. *Id.* at 110a-111a.

On March 1, 2012, the district court sentenced each petitioner to 48 months in prison, and imposed a fine of $175,000 on Bravo and $17,500 on Martínez. The government opposed petitioners' motions for bail pending appeal, and the district court denied those motions. As a result, Martínez began serving his sentence on March 1, 2012, and Bravo began serving his sentence on May 7, 2012. Pet. App. 64a & n.4.

3. On June 26, 2013, the First Circuit reversed or vacated each remaining conviction. Pet. App. 4a, 60a. Key here, the court vacated Bravo and Martínez's convictions on the standalone § 666 charges, because they resulted from unlawful jury instructions. *Id.* at 5a, 81a-105a. The court held that § 666 criminalizes only *quid pro quo* "bribes," not mere "gratuities." *Id.* at 102a-103a. The district court's instructions, however, "improperly invited the jury to convict both

Martínez and Bravo for conduct involving gratuities rather than bribes." *Id.* at 104a. Likewise, "the government's closing argument improperly invited the jury to convict the [petitioners] on the proscribed 'gratuity theory.'" *Id.* The court rejected the government's argument that the error was harmless, because "the evidence presented at trial could support a finding that the 'payment' Bravo gave and Martínez received constituted a gratuity." *Id.* at 104a-105a. The § 666 convictions—premised on erroneous instructions that permitted the jury to find guilt based on lawful conduct—thus "violate[d] due process." *Id.* at 105a (quoting *Fiore v. White*, 531 U.S. 225, 228 (2001)).

The court also reversed Bravo's conviction for conspiring to travel in interstate commerce to further "'racketeering' activity." *Id.* at 4a, 108a-120a. The only predicate "racketeering activity" the government had identified was bribery in violation of § 666 and Puerto Rico law, *id.* at 109a, but the Puerto Rico law had been repealed, and the court could not discern which predicate the jury had accepted, *id.* at 116a-117a. The government sought a remand to retry Bravo on a conspiracy-to-travel-to-violate-§-666 charge. But the collateral estoppel prong of the Double Jeopardy Clause, the court held, precluded retrial. The jury had acquitted Bravo of conspiring and traveling to violate § 666, and those acquittals, the court held, "necessarily decided" that Bravo did not conspire to travel to violate § 666. *Id.* at 118a-120a. At the time, the government did not argue that the inconsistent vacated convictions on the standalone § 666 charges stripped the acquittals on the conspiracy and travel charges of preclusive effect.

After oral argument but before issuing a decision, the First Circuit ordered the petitioners' release on

bail. In the meantime, Bravo served 8 months in prison and Martínez served 10 months in prison on the basis of the unlawful convictions. *Id.* at 64a-65a n.4.

4. On October 23, 2013, the First Circuit issued its mandate. Two days later, the district court entered a line order granting Bravo and Martínez a "judgment of acquittal" on all counts. Pet. App. 5a-6a. Later the same day, at the government's request, the court vacated its line order, noting that the First Circuit had not reversed, but only vacated, the convictions on the standalone § 666 charges. *Id.* at 6a. The district court denied petitioners' motion to reinstate the acquittals on the ground that the Double Jeopardy Clause barred the court from retracting them under *Evans v. Michigan*, 133 S. Ct. 1069 (2013). Pet. App. 37a, 54a-58a.

Thereafter, petitioners moved to preclude retrial of the § 666 charges under the Double Jeopardy Clause's separate collateral estoppel prong. Petitioners argued that collateral estoppel barred retrial on those charges, because a rational jury could not have acquitted petitioners of conspiring and traveling to violate § 666 without necessarily deciding that they did not violate § 666. The court denied the motions. Pet. App. 41a-53a.

5. The court of appeals affirmed. Petitioners argued—and the government did not dispute—that, standing alone, the jury's acquittals on the charges of conspiring to violate § 666 and traveling to violate § 666 necessarily depended on a finding that neither petitioner violated § 666. Pet. App. 12a-15a & n.5. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Under an ordinary double jeopardy analysis, petitioners urged, the Fifth

Amendment prohibited the government from re-prosecuting petitioners on the standalone § 666 charges.

But the court of appeals held that the Double Jeopardy Clause did not bar retrial. The court reasoned that the § 666 convictions—which were vacated because they were obtained unlawfully, in violation of the Due Process Clause—divested petitioners of their double jeopardy rights. Pet. App. 15a-33a. The vacated convictions, the court stated, were "part of what the jury did decide at trial" and factored into the double jeopardy analysis. *Id.* at 18a-20a. The court relied on *United States v. Powell*, 469 U.S. 57 (1984), which held that in a single trial, a defendant cannot challenge a valid conviction on the ground that it was inconsistent with a simultaneously rendered acquittal. The court of appeals explained that the vacated convictions here were inconsistent with the acquittals because a rational jury could not have acquitted petitioners of conspiring and traveling to violate § 666 without also acquitting them of the standalone § 666 charges. The court thus held that the vacated convictions "strip the acquittals ... of collateral estoppel effect." Pet. App. 15a.

The First Circuit acknowledged *Yeager*'s holding that an acquittal retains its preclusive effect even if the jury acted inconsistently and irrationally in acquitting on some counts but hanging on others. *Id.* at 17a-18a. Because "a jury speaks only through its verdict" and not through hung counts, *Yeager* held, hung counts are irrelevant in assessing what the jury necessarily decided in an *Ashe* analysis. *Id.* at 18a (quoting *Yeager*, 557 U.S. at 121-22). But the court below deemed vacated convictions "meaningfully different" from hung counts, because "vacated

convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Id.* at 17a-18a.

The First Circuit recognized that its holding was inconsistent with its 2013 decision holding that petitioners' acquittals barred re-prosecution on the conspiracy-to-travel-to-violate-§-666 charges. The court explained that the government in the first appeal had not raised, and so the court "did not address" at that time, whether the vacated § 666 convictions strip the acquittals of preclusive effect. Pet. App. 35a.[1]

SUMMARY OF ARGUMENT

Acquittals retain their preclusive effect under the Double Jeopardy Clause even if they appear inconsistent with the same jury's vacated, unlawful conviction.

I. Under a straightforward application of the double jeopardy collateral estoppel rule of *Ashe v. Swenson*, 397 U.S. 436 (1970), the jury's acquittals at the original trial preclude the government from retrying petitioners for violating 18 U.S.C. § 666. Under *Ashe*, the government may not re-litigate an issue that an earlier jury's acquittal necessarily decided in the defendant's favor. Double jeopardy applies unless "a rational jury" could have grounded its verdict of acquittal on an issue other than the one the defendant seeks to preclude. *Ashe*, 397 U.S. at 444. Here, the jury acquitted petitioners of both conspiring to violate § 666 and traveling in interstate commerce to violate § 666. The "single rationally conceivable issue in

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[1] The First Circuit also rejected petitioners' separate double jeopardy argument based on *Evans*, 133 S. Ct. 1069. This Court denied certiorari with respect to that question.

dispute," *id.* at 445, was whether petitioners violated § 666, and the acquittals necessarily determined that they did not. The acquittals accordingly preclude the government from trying to convince a second jury, at a second trial, that petitioners violated § 666.

The acquittals do not lose their preclusive effect because they may be inconsistent with the jury's vacated, unconstitutional convictions on the stand-alone § 666 charges. In *Yeager v. United States*, 557 U.S. 110 (2009), this Court held that an acquittal retains its preclusive effect despite any inconsistency with a hung count. The court rejected the notion that hung counts are part of the record of the prior trial for purposes of the *Ashe* analysis. Rather, *Yeager* held, the *Ashe* analysis considers only valid and final verdicts through which the jury expresses its judgment in a manner that is entitled to respect. Hung counts are irrelevant because they are not valid jury decisions that have ever been accorded respect; because they are insignificant nonevents for purposes of the continuing jeopardy aspect of double jeopardy; and because it is impossible to decipher what a hung count represents.

All this is true of invalid, vacated convictions, and *Yeager* therefore controls this case. Vacated convictions are the antithesis of valid, final verdicts. They are legal nullities that command no respect. They are equally insignificant for purposes of continuing jeopardy. And it is impossible to decipher what the vacated convictions represent, because petitioners received a fundamentally flawed trial tainted by faulty instructions.

United States v. Powell, 469 U.S. 57 (1984), confirms that a vacated conviction cannot strip an acquittal of preclusive effect. *Powell* held that, in a single trial, a

defendant cannot overturn a jury's valid conviction on one count as inconsistent with the same jury's valid acquittal on another count. The First Circuit extended *Powell* to hold that, because the jury acted inconsistently by acquitting on some counts but failing to acquit on others, collateral estoppel does not bar retrial. But *Powell* means that even a valid verdict cannot be used to second-guess the soundness of another valid verdict. If this is so, *Yeager* explained, then, *a fortiori*, a hung count cannot be used to second-guess the soundness of a valid verdict of acquittal. Neither can an *invalid* verdict. Using an invalid conviction to impugn an acquittal—the most sacrosanct verdict of all—manages to offend just about every principle of double jeopardy.

II. Allowing an unconstitutional conviction to deprive petitioners of other constitutional guarantees would contravene a foundational principle of American jurisprudence—that when a conviction is vacated, it is "wholly nullified and the slate wiped clean." *N. Carolina v. Pearce*, 395 U.S. 711, 721 (1969). To our knowledge, this Court has never held that a vacated conviction can be used against a defendant for any purpose. Vacated convictions are irrelevant for purposes of civil collateral estoppel. Vacated convictions cannot be used to impeach a criminal defendant, to establish an aggravating circumstance supporting the death penalty, to enhance a sentence, or to trigger immigration consequences. In short, vacated convictions stand for nothing, and the government offers no legitimate reason to depart from that rule here.

III. The First Circuit's decision invites all the prosecutorial abuses that *Ashe*'s collateral estoppel rule is designed to prevent. Collateral estoppel

mitigates "the potential for unfair and abusive prosecutions" stemming from prosecutors' ability to "spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. The depth and breadth of the criminal code gives prosecutors extraordinary power to bring overlapping, duplicative charges. And prosecutors have strong incentives to do so, because multiple charges increase the government's leverage in plea-bargaining and raise the odds of at least one conviction at a trial. Exacerbating the problem is the government's penchant for advocating erroneously expansive interpretations of criminal statutes and then, after a conviction is vacated, seeking to force the defendant to stand trial a second time under a proper interpretation of the statute. The prosecutions here are illustrative of these abuses.

If upheld, the decision below would encourage prosecutors to bring overlapping charges and push far-reaching interpretations of criminal statutes. Prosecutors could overcharge cases without fear of consequence, because in the event of a split jury decision the inconsistency would eliminate the preclusive effect of any acquittals. And if the government is better off with a vacated conviction than a hung count, prosecutors may take shortcuts—like pursuing convictions on unlawfully broad theories—rather than play it straight and risk a hung jury. This Court should reject any rule that puts the thumb on the scale of unlawful convictions.

ARGUMENT

I. A Jury's Acquittal Retains Preclusive Effect Under the Double Jeopardy Clause Regardless of an Inconsistent Vacated Conviction

If the Double Jeopardy Clause means anything, it means that acquittals are sacrosanct. Here, a jury acquitted petitioners of two bribery charges: conspiring and traveling to commit federal program bribery under 18 U.S.C. § 666. Under *Ashe v. Swenson*, 397 U.S. 436 (1970), those acquittals logically depended on a finding that petitioners did not commit bribery in violation of § 666, and the acquittals therefore preclude the government from re-prosecuting petitioners for violating § 666. And under *Yeager v. United States*, 557 U.S. 110 (2009), and *United States v. Powell*, 469 U.S. 57 (1984), the acquittals retain their preclusive effect despite any inconsistency with the jury's vacated, unconstitutional convictions on the standalone § 666 charges. The Double Jeopardy Clause thus protects petitioners from a second trial aimed at convincing a second jury to convict where the first jury acquitted.

A. *Ashe* Bars Re-Litigation of an Issue That an Acquittal Already Decided in the Defendant's Favor

A straightforward application of the collateral estoppel rule of *Ashe v. Swenson* precludes the government from retrying petitioners on the charge that they violated 18 U.S.C. § 666.

Ashe "squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119.

This collateral estoppel protection secures the finality and sanctity of acquittals, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). "For whatever else [the double jeopardy] guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-46 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)) (citation omitted). That protection would erode entirely without the doctrine of collateral estoppel. The "extraordinary proliferation of overlapping and related statutory offenses" over the last century has permitted "prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Id.* at 445 n.10. As a result, the "potential for unfair and abusive re-prosecutions [has] bec[o]me far more pronounced." *Id.*

The relevant question for double jeopardy collateral estoppel purposes, *Ashe* held, is whether an "issue of ultimate fact has once been determined by a valid and final judgment." *Id.* at 443. Courts accordingly must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (internal quotation marks omitted). In conducting this inquiry, courts must assume that the jury acted rationally in acquitting. Courts accordingly may not deny preclusive effect to an acquittal on the theory that the jury may have acted irrationally, for example, by "disbeliev[ing] substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest." *Id.* at 444 n.9 (internal quotation marks omitted). In

other words, we take a jury's acquittal at face value, full stop.

The jury in *Ashe* acquitted the defendant of robbing a participant in a poker game, and the government later sought to prosecute him for robbing a second participant in the same game. *Id.* at 439-40. But the "single rationally conceivable issue in dispute" at the first trial "was whether the [defendant] had been one of the robbers," and thus, assuming the jury acted rationally, the acquittal necessarily decided that he was not. *Id.* at 445. The Court held that the Double Jeopardy Clause barred the subsequent prosecution because the state could not "constitutionally hale him before a new jury to litigate that issue again." *Id.* at 446.

Likewise here. The jury acquitted petitioners of conspiring to violate § 666 and traveling to violate § 666. Each acquittal is a "valid and final judgment." *Ashe*, 397 U.S. at 443. Although the court of appeals did not decide the issue, the government did not dispute below that the acquittals, viewed in isolation, necessarily determined that petitioners did not commit the predicate offense of bribery under § 666. Pet. App. 12a-15a & n.5. Nor has the government disputed the point in this Court. *See* Pet. for Certiorari 7, 24; Brief in Opposition 12-23. And for good reason. The "single rationally conceivable issue in dispute," *Ashe*, 397 U.S. at 445, was whether petitioners committed bribery in violation of § 666. There was no dispute that petitioners agreed to go, and in fact traveled, to Las Vegas. The acquittals thus necessarily rested upon the jury's determination that petitioners did not violate § 666. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Id.* at 444. Thus, under *Ashe*, the Double

Jeopardy Clause precludes the government from attempting to convince a second jury that petitioners violated § 666.

B. Under *Yeager*, a Vacated Conviction Does Not Strip an Acquittal of Preclusive Effect

The First Circuit held that "the vacated convictions on the standalone § 666 [counts] ... strip the acquittals on the conspiracy and Travel Act counts involving § 666 of collateral estoppel effect." Pet. App. 15a. Seizing on *Ashe*'s direction to "undertake a 'practical' analysis based on the 'record' of the prior proceeding, and with an 'eye to all the circumstances of the proceedings,'" the court held that "the vacated convictions [were] part of [the] collateral estoppel inquiry," *id.* at 16a—*i.e.*, part of what the jury decided at trial. If the jury's acquittals decided that petitioners did not commit the predicate § 666 violations, the court continued, the jury could not rationally have convicted petitioners of the standalone § 666 charges. *Id.* at 31a-33a. Those vacated convictions, the court stated, "make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal." *Id.* at 11a. The court thus held that double jeopardy did not bar re-prosecution under § 666. The government echoes this reasoning, arguing that the vacated constitutions are part of the record of the prior proceeding. Brief in Opposition 13-14, 16. The government thus urges that a court "need not shut its eyes" to a conviction that, though invalid, may demonstrate that the jury was not acting rationally. *Id.* at 16.

But this is precisely the chain of reasoning that this Court rejected in *Yeager*. *Yeager* held that acquittals retain their preclusive effect under *Ashe* even if the jury acted inconsistently in hanging on other counts. Hung counts, *Yeager* held, are not a relevant part of

the "record" for purposes of the *Ashe* analysis. *Yeager* is indistinguishable in all material respects from this case, as vacated convictions are legal nullities every bit as much as hung counts. If anything, the government's attempt to infect the collateral estoppel analysis with a vacated, unconstitutional conviction is even more pernicious than the government's reliance on the hung count in *Yeager*.

1. *Yeager* Holds That Hung Counts Are Irrelevant in the *Ashe* Analysis

The defendant in *Yeager* was charged with numerous crimes, including securities fraud, wire fraud, and insider trading. The jury acquitted Yeager of the fraud counts but hung on the insider trading counts, and the government sought a retrial on the insider trading counts. 557 U.S. at 114-15. But a rational jury could not have acquitted Yeager of fraud without concluding that he "lacked insider information," an issue crucial to the insider trading counts as well. *Id.* at 120. The Fifth Circuit thus concluded that, "[v]iewed in isolation, ... the acquittals on the fraud charges would preclude retrial" on the hung insider trading counts. *Id.*

The Fifth Circuit nonetheless "refused to find the Government precluded from pursuing the hung counts in a new prosecution." *Id.* at 121. The court reasoned that "the hung counts must be considered to determine what issues the jury decided in the first trial," and "[v]iewed alongside the hung counts, ... the acquittals appeared less decisive." *Id.* at 120. "[I]f the jury found that [the defendant] did not have insider information, then the jury, acting rationally, would also have acquitted [him] of the insider trading counts." *Id.* at 120-21 (quotation marks omitted). "The fact that the jury hung was a logical wrinkle that made it

impossible," the Fifth Circuit concluded, "to decide with any certainty what the jury necessarily determined." *Id.* at 121.

This Court reversed. "[T]he interest in preserving the finality of the jury's judgment on the [acquitted] counts," the Court held, "bars a retrial on the [hung] counts." *Yeager*, 557 U.S. at 118. The "jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it," and the acquittal's "finality is unassailable." *Id.* at 122-23. By contrast, "the consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 122.

For multiple reasons, the Court held, "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding'" for purposes of the *Ashe* analysis. *Id.* at 121 (quoting *Ashe*, 397 U.S. at 444). First, juries do not "speak[]" through hung counts, and hung counts accordingly get no "respect as a matter of law or history." *Id.* at 121, 125. Second, hung counts are irrelevant "nonevents" for double jeopardy purposes because they do not terminate jeopardy. *Id.* at 118, 120, 123-24. Third, "there is no way to decipher what a hung count represents." *Id.* at 121. In sum, because the jury's acquittals for fraud, "viewed in isolation," meant that the jury had necessarily decided that Yeager lacked insider information, *Ashe*'s collateral estoppel rule barred the government from retrying him for insider trading. *Id.* at 120-21.

2. Vacated Convictions Are Equally Irrelevant in the *Ashe* Analysis

If hung counts are irrelevant under *Ashe*'s collateral estoppel analysis, so too are vacated convictions. Neither hung counts nor vacated convictions have the

"unassailable" finality of a jury's acquittal. *Yeager*, 557 U.S. at 123. Each and every criticism that *Yeager* directed at hung counts applies with equal or greater force to vacated convictions. Thus, under the Double Jeopardy Clause, an acquittal retains its full preclusive effect, without regard to an unconstitutional conviction.

a. A hung count disappears in the *Ashe* analysis, *Yeager* reasoned, because "hung counts have never been accorded respect as a matter of law or history." *Yeager*, 557 U.S. at 124 (quoting *Powell*, 469 U.S. at 67). "To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." *Id.* at 122. "Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle" as to what the first jury determined. *Id.* at 121. Hung counts "are not similar to jury verdicts in any relevant sense." *Id.* at 124.

Yeager necessarily presumed that the "jury verdicts" from which hung counts fundamentally differed were valid and final jury verdicts. Indeed, *Yeager* explained that *Ashe*'s collateral estoppel rule springs only from a "valid and final" judgment. *Yeager*, 557 U.S. at 119. That is the only kind of verdict that "'brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" *Id.* at 124 (quoting *Powell*, 469 U.S. at 67).

Vacated convictions are, by definition, the antithesis of valid, final verdicts; they manifestly "have never been accorded respect as a matter of law or history." *Id.* For centuries, the law has recognized that when a criminal judgment "is reversed for error, ... then it is the same as if it had never been." 4 W. Blackstone,

Commentaries on the Laws of England 336-37 (1769). "The errors in the trial impeach the conviction; and [the defendant] must stand in the position of any man who has been accused of a crime but not yet shown to have committed it." *Fiswick v. United States*, 329 U.S. 211, 223 (1946). In other words, a vacated conviction has been "wholly nullified and the slate wiped clean." *N. Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *accord Poland v. Arizona*, 476 U.S. 147, 152 (1986); *Bullington v. Missouri*, 451 U.S. 430, 442 (1981).

The decision below stands these venerable principles on their head. The court resurrected vacated convictions and perniciously elevated them to events of great constitutional significance working against the defendant. It would be astonishing for this Court to hold that the convictions here, which are invalid under the Fifth Amendment's Due Process Clause, are nonetheless valid for purposes of construing the Double Jeopardy Clause of the same Amendment.

When *Yeager* contrasted a hung count with a verdict through which the jury "speaks," the Court could not have been referring to a jury's judgment as reflected in a vacated conviction, much less an unconstitutional one. Invalid verdicts simply do not represent the voice of the community "in any relevant sense." *Yeager*, 557 U.S. at 124. Or put differently, the jury has not spoken in a way the law recognizes as legitimate and worthy of public respect. *Id.* Society has no respect for a jury's judgment that has been vacated, including, for instance, when a defendant engaged in conduct that the law does not make criminal.

Convictions are vacated only for structural error or prejudicial error, either one of which renders the jury's decision fundamentally invalid and meaningless.

With structural errors, the trial "*necessarily*" was "an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). With prejudicial errors, a court has concluded that the error "undermine[d] confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). And with forfeited errors requiring reversal, the error was both prejudicial and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotation marks omitted).

Surely *Yeager* did not contemplate that a jury "speaks" through a verdict rendered by five jurors or a panel of minors. Nor does a jury "speak" when it convicts after being ordered to return a guilty verdict, *cf. Rose v. Clark*, 478 U.S. 570, 578 (1986), or after being told by the judge that the defendant's "every single word ... was a lie," *Quercia v. United States*, 289 U.S. 466, 468 (1933). A jury certainly does not "speak" when it convicts based on a mere preponderance of the evidence—an error this Court already has held "vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). And the same is true when intentional racial discrimination infects jury selection, *Foster v. Chatman*, — S. Ct. — (2016), or the defendant is denied counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963)—or when failure to disclose exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), ineffective assistance of counsel, *Strickland*, 466 U.S. 668, or coerced confessions, *Arizona v. Fulminante*, 499 U.S. 279 (1991), undermine the reliability of the outcome. But the necessary implication of the government's position is that convictions vacated for any or all of these reasons are jury "decisions" that "speak" just the same as valid convictions.

None of these vacated convictions speak in any way that counts under our legal system, and neither do the ones here. The First Circuit vacated petitioners' § 666 convictions as unconstitutional precisely because they do not reflect the jury's agreement with respect to any relevant question. The district court asked the jury to convict if it found that petitioners engaged in *either* conduct that was lawful (a gratuity) *or* conduct that was unlawful (a bribe), and the jury convicted. That decision is meaningless. It makes no difference that jurors filled out a "verdict" form or that words came out of the foreperson's mouth at the end of the trial. Convictions that are vacated because the government cheated are no more "jury decisions" than Lance Armstrong is a "winner" of the Tour De France or the Eighteenth Amendment "prohibit[s]" the sale of "intoxicating liquors."

b. *Yeager* also held that a hung count is irrelevant in the *Ashe* analysis because a hung count is "a nonevent" for other double jeopardy purposes. 557 U.S. at 120. A vacated conviction is equally a nonevent for those other double jeopardy purposes and therefore equally irrelevant to the *Ashe* analysis.

A hung count is not an event that "terminates the original jeopardy," *Richardson v. United States*, 468 U.S. 317, 326 (1984), and thus a retrial is ordinarily a permissible "continuation of the initial jeopardy," *Yeager*, 557 U.S. at 118. As *Yeager* explained, "[t]he 'interest in giving the prosecution one complete opportunity to convict those who have violated its laws' justifies treating the jury's inability to reach a verdict as a *nonevent* that does not bar retrial." *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)) (emphasis added).

The rule that a hung count is a "nonevent" for purposes of continuing jeopardy compelled *Yeager*'s conclusion that a hung count is equally irrelevant for purposes of the double jeopardy collateral estoppel prong. "[F]or double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a *nonevent* and the acquittals on the fraud counts are entitled to" preclusive effect just as if those acquittals had stood alone at "a trial for a single offense." *Yeager*, 557 U.S. at 120 (emphasis added). In other words, Yeager's acquittals terminated jeopardy and were entitled to preclusive effect under *Ashe*, without consideration of nonevent hung counts that did not terminate jeopardy.

Yeager accordingly rejected the government's reliance on *Richardson*, 468 U.S. 317. Based on *Richardson*'s holding that a hung count *ordinarily* permits retrial, *id.* at 324-25, "the government extrapolate[d] the altogether different principle that retrial is *always* permitted whenever a jury convicts on some counts and hangs on others," *Yeager*, 557 U.S. at 123. But *Richardson* "did not open the door to using a mistried count to ignore the preclusive effect of a jury's acquittal." *Id.* at 124. It closed that door. *Richardson*'s "conclusion was a *rejection* of the argument—similar to the one the Government urges today—that a mistrial is an event of significance." *Yeager*, 557 U.S. at 123-24 (emphasis added). The principle that hung counts are insignificant nonevents for purposes of continuing jeopardy necessarily means that hung counts are nonevents for purpose of double jeopardy collateral estoppel analysis. *Id.* Indeed, it would be incoherent to hold that an event is insignificant for purposes of one aspect of the Double Jeopardy Clause but of controlling significance for another aspect.

Once again, *Yeager* is dispositive here. Just like a hung count, a vacated conviction neither terminates jeopardy nor prohibits retrial. "The general rule is that the [Double Jeopardy Clause] does not bar re-prosecution of a defendant whose conviction is overturned on appeal." *Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984) (citing *United States v. Ball*, 163 U.S. 662 (1896)). "[I]mplicit in the *Ball* rule permitting retrial after reversal of a conviction is the concept of 'continuing jeopardy.'" *Id.* (citation omitted). If the *Richardson* rule ordinarily permitting retrial of hung counts is "a rejection of the argument" that hung counts are relevant under *Ashe*, *see Yeager*, 557 U.S. at 123, the *Ball* rule ordinarily permitting retrial of vacated convictions is equally a rejection of the argument that vacated convictions are relevant under *Ashe*.

To hold otherwise would tear away at the foundation of the *Ball* rule. The "rule that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction ... rests on the premise that the original conviction has been nullified." *Bullington*, 451 U.S. at 442. In other words, the *Ball* rule "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 720-21.

That premise cannot coexist with the holding below that a vacated conviction retains significance for double jeopardy collateral estoppel purposes. *Pearce* confirms the point. There, the Court held that, if a jury convicts on retrial after a vacated conviction, the Double Jeopardy Clause does not "preclude[]" a "more severe sentence" than the one the trial court originally imposed in connection with the vacated conviction.

Pearce, 395 U.S. at 723. To give preclusive effect to the original sentence "would be to cast doubt upon the whole validity of the basic principle" of *Ball* that the vacated conviction has been "wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 721. Using a vacated conviction to cancel out the preclusive effect of an acquittal likewise would cast doubt on *Ball*'s premise. And if a *defendant* cannot gain any advantage from his "wholly nullified" conviction under *Pearce*, fundamental fairness bars the *government* from using such a conviction to its own advantage.[2]

The First Circuit accordingly had it backwards in stressing that the "convictions here were vacated only for trial error." Pet. App. 17a. In contrast to a reversal for insufficiency of the evidence, the court stated, "a 'reversal for trial error ... does not constitute a decision to the effect that the government has failed to prove its case,'" and ordinarily permits the government to retry. *Id.* at 17a (quoting *Burks v. United States*, 437 U.S. 1, 15 (1978)). But as just explained, the insignificance of a vacated conviction for purposes of continuing jeopardy means that a vacated conviction is equally insignificant for purposes of collateral estoppel. Here, the jury issued a "decision to the effect that the government failed to prove its case" by *acquitting* petitioners of conspiring and traveling to violate § 666. Just as in *Yeager*, those acquittals are

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[2] After rejecting the notion that a prior sentence had preclusive effect for double jeopardy purposes, *Pearce* held that the Due Process Clause creates a rebuttable presumption barring additional punishment following retrial, to ensure that such punishment was not imposed as a penalty on the exercise of the defendant's appeal right. 395 U.S. at 723-24. That due process aspect of *Pearce* has been partially overruled by *Alabama v. Smith*, 490 U.S. 794 (1989).

the only decisions that have any significance under the Double Jeopardy Clause.

c. *Yeager* additionally refused to consider hung counts in the *Ashe* analysis because "there is no way to decipher what a hung count represents." 557 U.S. at 121. A vacated conviction produces the same uncertainty, especially in cases of instructional error.

The government in *Yeager* argued that the hung insider trading counts necessarily showed that some number of jurors thought the defendant guilty of insider trading. Brief for United States at 30-34, *Yeager v. United States*, 557 U.S. 110 (2009) (No. 08-67) (hereinafter, "U.S. *Yeager* Brief"). This Court disagreed, explaining that hung counts need not reflect any substantive determination. To the contrary, "[a] host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang." *Yeager*, 557 U.S. at 121. No one can "identify which factor was at play in the jury room," and the Court declined to invite improper "speculation into what transpired." *Id.* at 121-22. "Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id.* at 122.

If anything, a vacated conviction is even *less* meaningful than a hung count. In *Yeager*, the defendant unquestionably received a fair trial, and at least some jurors presumably concluded that the government had proven the defendant guilty under the relevant law. In other words, at least some jurors concluded that the defendant had committed an actual crime. When a conviction is vacated, by contrast, the whole point is that we do not know what the jury

would have concluded in the absence of the error. Here, petitioners received an unfair trial tainted by faulty instructions, and one cannot say that *any* juror thought the government had proven *any* relevant fact. For all we know, the jurors found only that petitioners engaged in a gratuity, *i.e.*, conduct that all agree is not a crime. With proper instructions, the jury at a minimum might have hung on the § 666 counts, in which case *Yeager* would bar a retrial. It would be highly anomalous for this Court to hold that defendants are *worse* off when illegal instructions advocated by the government eliminate the possibility of a hung jury.

But at the very least, just as in *Yeager*, it is impossible to decipher what the vacated convictions at the 2011 trial represented. The jury might have convicted petitioners of the standalone § 666 counts for a "host of reasons." *Yeager*, 557 U.S. at 121. For example, all 12 jurors might have agreed that petitioners were not guilty of an "exchange," but one juror might have thought petitioners guilty of a "gratuity." Absent the improper gratuity theory, the jury might have acquitted on the standalone § 666 counts as well as the conspiracy and travel counts. But the instructions allowing conviction on an improper gratuity theory might have led the jury, as a consequence of "sharp disagreement" or "exhaustion," *id.* at 121, to settle on acquitting petitioners of the conspiracy and travel counts but convicting on the standalone § 666 charges. *See infra* at 46. That is no different than the possibility in *Yeager* that the jury, as a consequence of "sharp disagreement" or "exhaustion," settled by acquitting on the fraud counts but hanging on insider trading.

Alternatively, all 12 jurors might have thought petitioners guilty of a gratuity, while none thought them guilty of an exchange. But as a result of "confusion about the issues," *id.*, the jury might have chosen to convict petitioners on the § 666 charges while acquitting on the conspiracy and travel charges. That is no different than the possibility in *Yeager* that "confusion about the issues" could have caused the apparent inconsistency between the acquittals and hung counts.

This Court has recognized the risk that impermissibly broad charges will have precisely such mischievous influences. In *Price v. Georgia*, 398 U.S. 323 (1970), the defendant faced an improper murder charge and a proper manslaughter charge, and the jury convicted him of manslaughter. The inclusion of the improper murder charge was not harmless error despite the jury's acquittal on that charge, the Court held, because the presence of an impermissibly broad charge may have "induced the jury to find [the defendant] guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.* at 331. Similarly here, the faulty instructions may have induced the jury to convict where it otherwise would not have.

C. *Powell* Confirms That a Vacated Conviction Cannot Strip an Acquittal of Preclusive Effect

The First Circuit held that *United States v. Powell*, 469 U.S. 57 (1984), imposes an "important limitation" on *Ashe*'s collateral estoppel rule. Pet. App. 10a. *Powell* held that, in a single trial, a defendant may not overturn a jury's valid conviction on one count as inconsistent with the same jury's acquittal on another count. 469 U.S. at 69. The court below extended

Powell to hold that, because the jury acted inconsistently in acquitting on some counts and failing to acquit on others, collateral estoppel does not bar retrial. Pet. App. 11a.

This too should sound familiar. The First Circuit embraced the very argument this Court rejected in *Yeager*—namely, that *Powell* extends to the context of a re-prosecution and forecloses collateral estoppel when the first jury inconsistently acquitted on one count but not another. U.S. *Yeager* Brief 30-31. In rejecting that argument, *Yeager* held that *Powell* undermined—not advanced—the government's position. *Powell* in fact compelled the conclusion that Yeager's acquittals *retained* preclusive effect despite the apparent inconsistency with the hung counts. *Yeager*, 557 U.S. at 124-25. Again, the arguments for ignoring vacated convictions are even stronger.

1. *Powell* Holds That One Valid Verdict Cannot Impugn Another Valid Verdict

In *Powell*, the jury convicted the defendant of using a telephone to facilitate certain drug offenses, but acquitted her of the predicate drug offenses. *Id.* at 59-60. On appeal, the defendant challenged the conviction on the ground that it was inconsistent with the jury's simultaneously rendered acquittals. The defendant argued that "collateral estoppel should apply to verdicts rendered by a single jury, to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.* at 64.

This Court rejected the notion that double jeopardy applies to inconsistent verdicts in a single trial and accordingly addressed the question whether the inconsistency mattered "only under [its] supervisory

powers over the federal criminal process." *Id.* at 65. And in holding that the valid conviction must stand, the Court reasoned that "the same jury reached inconsistent results; once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Id.* at 68.

Relying on its decision to the same effect in *Dunn v. United States*, 284 U.S. 390 (1932), the Court reaffirmed that "a criminal defendant convicted by a jury on one count [may] not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *Powell*, 469 U.S. at 58. Litigants may not object to a valid, final verdict on the ground that, based on an another, inconsistent valid verdict, the jurors "did not speak their real conclusions." *Id.* at 64-65 (quoting *Dunn*, 284 U.S. at 393). As a matter of policy, *Powell* explained, "[c]ourts have always resisted inquiring into a jury's thought processes; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.* at 67 (citations omitted).

2. *A Fortiori*, an Invalid Conviction Cannot Impugn a Valid Acquittal

Powell commands the conclusion that an invalid conviction does not eliminate the preclusive effect of an acquittal, regardless of an apparent inconsistency.

Yeager explained: "In *Powell* and, before that, in *Dunn*, [the Court] w[as] faced with jury verdicts that, on their face, were logically inconsistent and yet [the Court] refused to impugn the legitimacy of either verdict." 557 U.S. at 125. *Powell* and *Dunn* hold that

"a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." *Yeager*, 557 U.S. at 112. "[R]espect for the jury's verdicts counseled giving each verdict full effect, however inconsistent." *Id.* at 124.

Yeager thus explained that, under *Powell*, acquittals retain their preclusive effect despite the jury's apparent inconsistency in hanging on other counts. Citing *Powell* and *Dunn*, the government had argued that the acquittals lacked preclusive effect because "a jury that acquits on some counts while inexplicably hanging on others is not rational." 557 U.S. at 124. This argument, *Yeager* held, "misreads" *Powell* and *Dunn*. *Id.* at 125. Those decisions "declined to use a clearly inconsistent verdict [the acquittal] to second-guess the soundness of another verdict [the conviction]." *Id.* If a final, valid verdict cannot impugn another valid verdict, *Yeager* explained, "then, *a fortiori*, a potentially inconsistent hung count could not command a different result"—*i.e.*, a hung count could not eliminate the double jeopardy preclusive effect of an acquittal. *Id.*

Yet again, that analysis applies with even greater, and at least equal, force here. If an inconsistent *valid* verdict cannot impugn another verdict under *Powell*, then, "*a fortiori*," an inconsistent *vacated* conviction cannot "command a different result"—*i.e.*, a vacated conviction cannot eliminate the preclusive effect of an acquittal. *Id.*

The government's reliance on *Powell* here is even more "serious[ly] flaw[ed]" than it was in *Yeager*. 557 U.S. at 124. First, if it is improper to "equat[e]" hung counts and valid verdicts, *id.*, it is even more improper to equate vacated convictions and valid verdicts. *Yeager* described hung counts as the "thinnest reed of

all" with which to "second-guess the soundness" of an acquittal. *Id.* at 125. Evidently the Court did not anticipate that the government would try to use vacated, unconstitutional convictions.

Second, if it is improper under *Powell* to use an inconsistent verdict to second-guess a valid verdict of *conviction*, it is all the more improper to second-guess a valid verdict of *acquittal*. An acquittal is the most sacrosanct verdict of all under the Double Jeopardy Clause. "[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment [of acquittal]." *United States v. Scott*, 437 U.S. 82, 92 (1978). Verdicts of acquittals accordingly are entitled to "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), and "particular significance," *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980) (quoting *Scott*, 437 U.S. at 91). For centuries, the law has safeguarded acquittals against any challenge—even "flat-out acquittals in the face of guilt," *Jones v. United States*, 526 U.S. 227, 245 (1999), and acquittals "based upon an egregiously erroneous foundation," *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) (internal quotation marks omitted).

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that 'a verdict of acquittal ... could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen*, 430 U.S. at 572 (quoting *Ball*, 163 U.S. at 671). "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendants so that 'even though

innocent, he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188).

In short, *Powell*'s respect for the finality of valid verdicts necessarily forecloses the government from using an invalid, vacated conviction to strip a valid acquittal of its preclusive effect.

3. The Government Cannot Attribute Irrationality to Jury Acquittals

The government relies on *Powell*'s observation that, when "the same jury reached inconsistent results[,] ... principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." 469 U.S. at 68; *see* Brief in Opposition 15 (quoting same). Or, as the First Circuit theorized, an unlawful conviction, though vacated, "may still suggest that an acquittal with which that conviction conflicts was the result of 'mistake, compromise, or lenity.'" Pet. App. 18a (quoting *Powell*, 469 U.S. at 65).

But *Yeager* rejected these exact arguments, because the *Ashe* analysis does not permit the second-guessing of acquittals. In *Yeager*, quoting the very same language from *Powell*, the government argued that the jury's "inconsistency vitiates 'the assumption that the jury acted rationally,' which is a necessary predicate for application of collateral estoppel." U.S. *Yeager* Brief 30 (quoting *Powell*, 469 U.S. at 68). The government further argued that the inconsistency shows that it was "'equally possible' the acquittal was the result of 'mistake, compromise, or lenity'"; "[a]ll a court can conclude is that the jury acted inconsistently and irrationally"; and "[a]ccordingly, the logical predicate for applying collateral estoppel is missing." U.S. *Yeager* Brief 31 (quoting *Powell*, 469 U.S. at 65).

Yeager found all this unconvincing: collateral estoppel applies despite any inconsistency between the hung counts and the acquittals. *Yeager* did so even though, where an acquittal rests on a factual finding that logically required an acquittal on a hung count, one can equally say that "the conflicting dispositions are irrational—the result of 'mistake, compromise, or lenity.'" *Yeager*, 557 U.S. at 132 (Scalia, J., dissenting) (quoting *Powell*, 469 U.S. at 65).

Powell did not involve either a vacated conviction or a subsequent prosecution, *i.e.*, the posture of this case. *Powell* instead means that collateral estoppel cannot apply in the context of inconsistent *valid* verdicts at a *single* trial, where giving collateral estoppel effect to either determination would undermine the other. But petitioners did not seek to use the inconsistent verdicts as a basis for vacating the convictions. Rather, the convictions were invalid not because of any inconsistency, but because the government charged petitioners with conduct that did not constitute a crime.

Where the only valid verdict in the first trial is an acquittal, *Yeager* holds that the assumption of rationality fully applies to that acquittal and that the acquittal must be viewed in isolation. The government cannot *undermine* that assumption by using a hung count, which is not itself a valid verdict, to attack as irrational the only valid verdict, namely the acquittal. "By relying on hung counts to question the basis of the jury's verdicts, the Government violates the very assumption of rationality it invokes for support." *Yeager*, 557 U.S. at 125.

The government's argument in this case would violate the assumption of rationality in the same way. Today, the valid verdicts from the 2011 trial—the

verdicts of acquittal for conspiring and travelling to violate § 666—are entirely consistent with each other. They reflect no irrationality. As in *Yeager*, the government seeks to question the rationality of those acquittals—this time, by relying on the vacated convictions. And by pursuing a retrial, the government seeks to *create* irrationality—to convince a second jury to reach final, valid verdicts of conviction that the government concedes would be at odds with the first jury's acquittals. *Powell*'s refusal to disturb existing inconsistent final verdicts hardly suggests that this Court should adopt a rule encouraging their creation.

The government's position not only runs headlong into *Powell* and *Yeager*, but also into *Ashe* itself. *Ashe* mandates examining the acquittal and determining what "a *rational* jury could have grounded its verdict upon," regardless of whether the jury in fact may have acted irrationally. 397 U.S. at 444 (emphasis added). Collateral estoppel thus barred the subsequent prosecution in *Ashe* because "[t]he single *rationally* conceivable issue in dispute" was the identity of the robber. *Id.* at 445 (emphasis added). *Ashe* commands that acquittals be taken at face value, and bars any further inquiry into whether the jury may have acted irrationally, for instance, by "disbeliev[ing] substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest." *Id.* at 444 n.9 (internal quotation marks omitted).

All this forecloses any notion that valid, final acquittals lack preclusive effect because the jury may have acted irrationally in failing to acquit on other counts. With any other rule, the "possible multiplicity of prosecutions [would be] staggering." *Id.* (internal quotation marks omitted). In any number of

situations, the government may think it can prove—based on "the record of [the] prior proceeding ... with an eye to all the circumstances," *id.* at 444—that an acquittal was irrational or otherwise did not reflect the jury's real conclusion. Suppose that in a trial on a single-count indictment with only one disputed fact, the jury acquits but writes on the verdict form: "We unanimously believed that the defendant was guilty, but we acquitted based on lenity"—or "exhaustion" or "mistake" or "we hated the prosecutor" or "we distrust the government" or "we flipped a coin." Or suppose prosecutors put on irrefutable DNA evidence of guilt; defense counsel puts on no case, admits guilt in closing argument, and pleads only for lenity; and the jury then acquits.

If the government can use a vacated, unconstitutional conviction to establish the irrationality of an acquittal and deprive it of preclusive effect, no logical distinction would bar the government from similarly proving irrationality in any of these situations. In each, the government could effectively rebut the assumption of rationality assigned to acquittals. But going down this road would risk eviscerating the collateral estoppel rule, and with it an essential double jeopardy protection founded on our unwavering reverence for acquittals.

II. A Vacated, Unconstitutional Conviction Cannot Deprive a Defendant of an Otherwise Applicable Constitutional Right

A rule giving effect to a vacated conviction is contrary to a host of this Court's precedents and would have broad and troubling implications for our criminal justice system. The First Circuit invoked a conviction that violated the Due Process Clause to deprive petitioners of the protections of the Double Jeopardy

Clause. To our knowledge, this Court has never held that a vacated conviction can be used against a defendant for any purpose. To the contrary, this Court has expressly held that a defendant whose conviction was invalid "must stand in the position of any man who has been accused of a crime but not yet shown to have committed it." *Fiswick*, 329 U.S. at 223. It is accordingly hornbook law across a wide variety of contexts that a vacated conviction is a legal nullity that stands for nothing. *Pearce*, 395 U.S. at 721; *Poland*, 476 U.S. at 152; *Bullington*, 451 U.S. at 442. The government should never benefit from an unconstitutional conviction that prosecutors secured by advancing an overreaching interpretation of a criminal statute. This Court certainly should not depart from its precedent and make an exception to deprive a defendant of *another* constitutional right.

Most notably, vacated convictions are irrelevant for purposes of civil collateral estoppel. Collateral estoppel "means simply that, when an issue of ultimate fact has once been determined by a *valid and final* judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 439 (emphasis added); *see* Restatement (Second) of Judgments § 27 (collateral estoppel requires a "valid and final judgment"). Thus, a vacated judgment has been "subverted and rendered null and void for the purpose of [collateral estoppel]." *Butler v. Eaton*, 141 U.S. 240, 242-43 (1891). Vacating one judgment requires vacating the judgment that depended on it, because the original judgment "is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed." *Id.* at 244.

This rule necessarily bars civil collateral estoppel based on a vacated criminal judgment, even where the

conviction was vacated on "grounds having no bearing on the validity of the fact-findings." *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). And not only are vacated judgments disentitled to direct collateral estoppel effect, the fact of the decision is inadmissible even as evidence supporting the formerly victorious party. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir. 1974).

Because vacated convictions are irrelevant for civil collateral estoppel, they must be irrelevant for the collateral estoppel aspect of the Double Jeopardy Clause. This Court held a century ago that the rule of collateral estoppel cannot be any less protective of criminal defendants than it is of civil litigants. "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (Holmes, J.); *see also Yeager*, 557 U.S. at 119 n.4 (quoting same). "[T]he 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice, in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." *Oppenheimer*, 242 U.S. at 88.

The rule that vacated convictions have no collateral estoppel effect is merely one example of an equally well-settled, categorical rule: an invalid, "vacated conviction [may not] be used to the defendant's detriment." *People v. Wilson*, 852 N.W.2d 134, 141 n.5 (Mich. 2014). An invalid or vacated conviction may not be used to impeach a criminal defendant. *Loper v. Beto*, 405 U.S. 473, 483 (1972); *United States v. Russell*, 221 F.3d 615, 622 (4th Cir. 2000). A vacated conviction may not be used to establish an aggravating

circumstance supporting the death penalty. *Johnson v. Mississippi*, 486 U.S. 578, 585-86 (1988). A vacated conviction may not be used to enhance a sentence. *Johnson v. United States*, 544 U.S. 295, 303 (2005). And a vacated conviction means that "there is no longer a 'conviction' for immigration purposes." *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010).

In turn, when a conviction is vacated, all the collateral consequences that attach to a valid conviction disappear. One reason that the completion of a criminal sentence does not moot a criminal appeal is that vacating the conviction would eliminate any collateral consequences, such as the loss of voting or other civil rights. *Sibron v. New York*, 392 U.S. 40, 50-58 (1968); *Pollard v. United States*, 352 U.S. 354, 358 (1957); *United States v. Morgan*, 346 U.S. 502, 512-13 (1954); *Fiswick*, 329 U.S. at 223. Vacating a conviction affords the defendant "relief not only from the conviction's *direct* consequences (*e.g.* incarceration), but also from its *collateral* consequences." *Gentry v. Deuth*, 456 F.3d 687, 693 (6th Cir. 2006).

The First Circuit did not question that a "vacated conviction has been 'nullified.'" Pet. App. 16a (quoting *Bullington*, 451 U.S. at 442). Nevertheless, quoting *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004), the court stated that "the 'fact of the conviction'" remains even after the vacatur, and that "it is the 'fact of the conviction,' and not its 'attendant legal disabilities,' that is relevant to the *Ashe* analysis." Pet. App. 16a. But *Crowell* held only that a defendant cannot bring a motion for expungement to collaterally attack a conviction. *Crowell* is entirely inapposite and does not stand for the proposition that a vacated

conviction can have legal significance in the government's favor. Drawing a basic distinction between vacating a conviction and expunging it, the court held that even after a conviction is vacated, the "fact of the conviction" remains in the sense that the court does not "destroy or seal the records of the fact of the defendant's conviction." 374 F.3d at 792. The fact that no one has shredded the paperwork recording the vacated convictions here is no license for the government to use them against petitioners.

In any event, it is decidedly not the "fact of the conviction" that the First Circuit took into account in depriving petitioners of the protections of the Double Jeopardy Clause. Rather, the court examined in depth the purported underlying factual determinations by the jury that the court found were reflected in the vacated convictions. That is why the court devoted 20 pages of its slip opinion to exploring what the jury "necessarily decided" when it convicted the petitioners on the basis of unlawful instructions. Pet. App. 20a-33a. Reciting the historical "fact of the conviction" would have taken one sentence. And it is Kafkaesque to tell a defendant that his vacated conviction is not being used to impose any "attendant legal disabilit[y]," *id.* at 16a, when the vacated conviction is the sole reason that he remains exposed to a criminal charge carrying a potential 10-year sentence. Under the First Circuit's rule, the government may retry petitioners *only* because the government previously obtained illegal convictions based on illegal jury instructions. But this Court held long ago that attaching collateral consequences to a vacated conviction impermissibly "would permit the government to compound its error at [the defendant's] expense." *Fiswick*, 329 U.S. at 223.

This Court should not depart from the foundational rule that the government cannot use a vacated conviction against a defendant. And the Court should be especially reluctant to do so where the government's fundamental goal in using the vacated conviction is to question the defendant's innocence on the same charge. When a conviction is vacated, the presumption of innocence is restored—"unless and until petitioner should be retried, he must be presumed innocent." *Johnson*, 486 U.S. at 585. But the government's theory is that the vacated convictions embody a factual finding of guilt, and worse yet, one that impugns the jury's *valid* finding of innocence on overlapping charges.

The double jeopardy protection is "a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued." *Green*, 355 U.S. at 198. "If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." *Id.* It would be a narrow and grudging application indeed to hold that vacated convictions are null for all purposes but this one, and that the protections of double jeopardy are defeated by a judgment the product of a "judicial process which is defective in some fundamental respect." *Burks*, 437 U.S. at 15.

III. The Decision Below Invites Prosecutorial Abuse

Ashe's collateral estoppel rule is designed to mitigate the abuses made possible by the breathtaking array of overlapping criminal offenses set out in the modern criminal code. The decision below turns that design on its head. Overcharging a case often produces split jury verdicts, and the government's position would permit prosecutors to avoid collateral

estoppel by engaging in precisely the abuses the rule is designed to stifle. The decision below in fact encourages prosecutors to bring multiple, overlapping charges, and to advocate overbroad interpretations of criminal statutes. This Court should not sanction such perverse incentives for the government.

A. Overcharging and Overbroad Interpretations of Criminal Statutes Are Rampant

1. In the early years following the enactment of the Double Jeopardy Clause, few situations arose calling for application of collateral estoppel because criminal offenses "were relatively few and distinct," meaning "[a] single course of criminal conduct was likely to yield but a single offense." *Ashe*, 397 U.S. at 445 n.10. But with the "extraordinary proliferation of overlapping and related statutory offenses," prosecutors gained the ability to "spin out a startlingly numerous serious of offenses from a single alleged criminal transaction." *Id.* "As the number of statutory offenses multiplied, the potential for unfair and abusive prosecutions became far more pronounced." *Id.* Collateral estoppel operates as a "safeguard" to "prevent against such abuses." *Id.*

The problem has only grown worse since *Ashe*. Three of every five federal crimes "enacted since the Civil War have been enacted since 1970," when the Court decided *Ashe*. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 653 (2006). In 2008, the United States Code contained at least 4,450 federal crimes, with Congress creating 500 new crimes per decade. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum (Heritage Foundation), June 16, 2008, at 1. In this respect, criminal law presents "a singular

case in the legislative process: criminal law expands unusually easily, and its contraction is unusually difficult." Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 233 (2007).

The consequence is a cornucopia of criminal statutes that cover similar, if not identical, conduct. To name a few examples, the federal criminal code in 1998 contained "232 statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction." O'Sullivan, *supra*, at 654.

The depth and breadth of the criminal code gives prosecutors extraordinary power to bring overlapping, duplicative charges. Prosecutors "retain 'broad discretion' to enforce the Nation's criminal laws," *United States v. Armstrong*, 517 U.S. 456, 464 (1996), including the discretion to decide whom to charge, what charges to bring, and how many. Prosecutors "have the ability to pick and choose among a smorgasbord of statutes that might apply to given criminal conduct." O'Sullivan, *supra*, at 654. As long as each count represents a "distinct offense," *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and is supported by probable cause to indict, prosecutors can charge as many offenses as they want. And coming up with multiple charges for a single, allegedly unlawful act is not difficult. In one U.S. Attorney's Office, it was sport. Prosecutors reportedly made a game of dreaming up criminal charges they could bring against random celebrities using "broad yet obscure crimes that populate the U.S. Code." Tim Wu, *American Lawbreaking*, Slate (Oct. 14, 2007), http://goo.gl/AFsWXl.

Games aside, prosecutors in fact have strong incentives to engage in "horizontal overcharging—

multiplying unreasonably the number of accusations against a single defendant." Albert W Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 85 (1968) (internal quotation marks omitted). Plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense." *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting). "Prosecutors throw everything in an indictment they can think of, down to and including spitting on the sidewalk." Alschuler, *supra*, at 86. By charging multiple offenses, "prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519-20 (2001). Additional, duplicative charges increase prosecutors' leverage, and pressure defendants to take deals. Defendants must either go to trial risking an extremely long sentence or ensure a much shorter sentence by taking a plea. "[T]hat state of affairs is not the exception, but the rule." *Id.* at 519.

If a defendant goes to trial, he faces a prosecutor armed with a multitude of charges, but needing a conviction on only one. And multitudinous charges dramatically increase the likelihood of at least one conviction. The conviction rate at trial is 68% for a single-count indictment, but jumps to 82% when prosecutors charge two counts and to 88% when they charge three. Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 367-68 (2006). The many charges allow jurors to "horse trade" counts if there is disagreement as to guilt, and also can lead jurors wrongly to believe that

a defendant charged with so many offenses must be guilty of something. Multi-count indictments also increase the chances that the defendant will be convicted of the most serious offense charged, or the "top count." *Id.* at 367.

These statistics have real consequences when prosecutors' job performance frequently is measured by conviction rates. At the state level, elected prosecutors often "cite conviction rates in their campaigns." Stuntz, *supra*, at 534. And the Justice Department evaluates attorneys based in part on the "percentage of cases favorably resolved,"[3] meaning a prosecutor's conviction rate. Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 Cornell J. L. & Pub. Pol'y 53, 64 (2012).

It is not hard to find recent and extreme examples of blatant overcharging. In one case, the defendant was convicted of conspiracy to commit arson and also of "the use of fire to commit another felony" where the "predicate felony was conspiracy to commit arson"—in other words, (1) conspiracy to use fire and (2) using fire to conspire to use fire. *United States v. Anderson*, 783 F.3d 727, 737 (8th Cir. 2015). In another case, the defendant was convicted of "assault with a dangerous weapon in furtherance of a racketeering enterprise" and "use of a firearm in relation to a crime of violence" where the predicate crime of violence was the assault with a dangerous weapon. *United States v. Garcia*, 754 F.3d 460, 475 (7th Cir. 2014). And in another case, defendants were convicted of "sex trafficking by fraud"

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[3] U.S. Gov't Accountability Off., GAO-04-422, Report to Congressional Requesters, U.S. Attorneys: Performance-Based Initiatives Are Evolving 5 (2004).

and "benefitting by participating in a venture that commits sex trafficking by fraud"—even though these offenses appeared in subsections of the same statute and involved the same underlying conduct. *United States v. Flanders*, 752 F.3d 1317, 1327 (11th Cir. 2014).

2. Compounding the problem is Congress' penchant for enacting broadly worded offenses and the government's penchant for pushing interpretations even broader than Congress imagined. The government frequently wins convictions under graspingly expansive theories that are later rejected on appeal, forcing defendants to undergo the "embarrassment, expense and ordeal" of a second trial premised on a proper interpretation of the statute—the interpretation that the government should have started with. *Green*, 355 U.S. at 187-88.

In *Bond v. United States*, 134 S. Ct. 2077 (2014), this Court rejected the government's interpretation of the Chemical Weapons Convention Implementation Act that would "sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room." *Id.* at 2091. "[T]he global need to prevent chemical warfare," the Court admonished, "does not require the Federal Government to reach into the kitchen cupboard." *Id.* at 2093. Similarly in *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court "reject[ed] the Government's unrestrained reading" of the Sarbanes-Oxley Act to prohibit a fisherman from throwing overboard undersized red grouper, a reading that "extends beyond the principal evil motivating [the Act's] passage." *Id.* at 1081; *see also Skilling v. United States*, 561 U.S. 358, 410-11 (2010) (rejecting the government's "amorphous" and "less constrained construction" of the honest-services

fraud statute); *Chambers v. United States*, 555 U.S. 122, 128-30 (2009) (rejecting the government's interpretation of "violent felony" as including failure to report to penal institution); *Jones v. United States*, 529 U.S. 848, 857 (2000) (rejecting the government's "expansive" interpretation of "affecting . . . commerce" in the federal arson statute); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting the government's "sweeping expansion" of federal criminal jurisdiction through a broad interpretation of "property" in the federal mail fraud statute).

Lower courts likewise have noted the "string of recent cases in which ... federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds." *United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (Kozinski, C.J., concurring); *see also United States v. Newman*, 773 F.3d 438, 448 (2d Cir. 2014) (decrying the "doctrinal novelty of recent insider trading prosecutions").

This prosecution exemplifies both problems. On the basis of a single weekend trip to Las Vegas worth perhaps a few thousand dollars, the government charged petitioners with multiple, overlapping felonies: federal program bribery, traveling in interstate commerce in furtherance of federal program bribery, conspiring to commit federal program bribery, and conspiring to travel in interstate commerce in furtherance of federal program bribery—not to mention the additional counts alleging that petitioners violated *repealed* Puerto Rico bribery statutes. Simultaneously, over petitioners' vehement objections, the government sought and obtained instructions permitting the jury to convict petitioners of federal program bribery under a gratuity theory, rather than a bribery theory. The government argued

the gratuity theory to the jury in closing, and won a conviction based on that unlawful theory. Pet. App. 104a.

B. The Decision Below Exacerbates Government Overreaching

While *Ashe*'s collateral estoppel rule was designed to prevent these prosecutorial abuses, the decision below would have the opposite effect—it would encourage prosecutors to overcharge cases and to push far-reaching interpretations of criminal statutes. Prosecutors can overcharge as a form of insurance against the possibility of an acquittal on any particular count. They know that if they do, the odds are in their favor. Excluding defendants whose charges are dismissed pre-trial, 99.6% of federal criminal defendants in this country are convicted.[4] And prosecutors will push for broad interpretations of criminal statutes, knowing that if their interpretation is rejected on appeal, they can simply retry the case—making the first trial "no more than a dry run for [a] second prosecution." *Ashe*, 397 U.S. at 447. The risk of this outcome, in turn, will further motivate defendants to accept a plea, even if they are innocent and have a strong defense, because it is difficult to secure acquittals from two juries at successive trials on every count in a duplicative multi-count indictment. And in the event of any inconsistency in the jury's verdicts, the defendant must stand trial again. From the government's perspective, trial becomes a coin toss where it is heads I win, tails I get a do-over.

The interplay between *Yeager* and the decision below would exacerbate the risk of abuse. In a case

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[4] *See* Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download.

with a multi-count indictment where a split decision is likely, prosecutors would prefer an invalid conviction over a hung count. If an acquittal is inconsistent with an invalid conviction, the decision below would let the government take a second bite at the apple. But if the acquittal is inconsistent with a hung count, collateral estoppel bars retrial under *Ashe* and *Yeager*. This dichotomy would create perverse incentives for prosecutors to advocate overreaching interpretations and engage in other unfair tactics that increase the chances of a conviction relative to a hung count, secure in the knowledge that they get to retry if the conviction is invalidated on appeal.

Permitting the government to take multiple bites at the apple increases the likelihood of wrongful convictions of the innocent. *Green*, 355 U.S. at 187-88. In this case, a rational jury could not have acquitted petitioners of the conspiracy and travel charges without finding that they did not commit federal program bribery—the exact offense the government now wants to retry. Pet. App. 12a-15a n.5. Yet the First Circuit gave the government another chance because the government brought duplicative charges and won an invalid conviction under an incorrect theory that unlawfully reduced the government's burden. Letting the decision below stand sanctions and rewards the government's abuses.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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